In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1044

MEYER SIGAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 341 F. 2d 837.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1965. A petition for rehearing was denied on March 9, 1965. The petition for a writ of certiorari was filed on April 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court reporter's failure to record the *voir dire* examination of the jury requires reversal of petitioner's conviction.

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2. Whether internal revenue agents could execute search warrants.

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner and three others were convicted under all seven counts of an indictment that charged them with operating a numbers game without complying with various provisions of the wagering tax laws. Petitioner received a total sentence of five years' imprisonment and a fine of $15,000 (III P.A. 1369–1370).[1]

The facts pertinent to the two issues presented in the instant petition may be briefly stated as follows.

1. Pursuant to local rule 19 of the district court, in force at the time of petitioner's trial (but since abrogated),[2] the jury was selected in an open assignment room instead of in the court room. The *voir dire* examination consisted of six questions set forth in Rule 19 and three questions which the parties had proposed and the court had approved after a hearing in chamber. The court refused to allow two other questions, proposed by petitioner, to be put to the

[1] The record consists of petitioner's three-volume appendix (designated "P.A.") and the government's appendix (designated "G.A.") in the court below.

[2] The provisions of Rule 19 appear at Pet. App. 18–19, note 33. In *Stirone* v. *United States*, 341 F. 2d 253, 256, notes 3, 4 (C.A. 3), certiorari denied, May 3, 1965, No. 982, this Term, the court of appeals disapproved the Rule 19 practice of selecting juries in an open assignment room without a court reporter present. The United States Attorney advises us that even before the *Stirone* decision was handed down the district court had abandoned Rule 19 and required a court reporter to record all impaneling proceedings.

prospective jurors. A court reporter recorded the hearing in chambers when the *voir dire* questions were proposed, but, as was then customary, no court reporter was present in the open assignment room when the questions were actually put to the jurors (Pet. App. 18; I. R. 295-298). After the jury had been selected, each defendant signed, and each defense attorney attested, the following waiver (G.A. 1):

> STATEMENT OF SATISFACTION AS TO THE PROCEDURE APPLIED TO THE SELECTING OF JURY
>
> I do hereby waive the right to have the jury in this criminal proceeding selected in the presence of a member of the Court. I do hereby further state and certify that the jury was selected in the open assignment room of the Court and that I was present with my counsel during the whole of the period of time applied in the selection of the jury. I do further certify that I am satisfied and agreeable to the procedure applied to the selection of the jury.

2. At the trial, the government introduced evidence seized pursuant to search warrants during raids on a restaurant and a house that were integral parts of the numbers operation. The search warrants were addressed "[t]o any duly authorized agent of the Internal Revenue Service." The warrants were issued on affidavits of Robert J. Madden, a special agent in the Intelligence Division of the Internal Revenue Service, and were executed by Madden and agents under his supervision (I P.A. 8-22).

The court of appeals affirmed the conviction, with one judge dissenting on the ground that the case should have been remanded to the district court to determine whether appellant had waived the right to have the *voir dire* examination of the jury reported (Pet. App. 1–27; 341 F. 2d 837).

ARGUMENT

1. There is no occasion to review the ruling of the court of appeals that in the particular circumstances of this case the court reporter's failure to record the *voir dire* examination of the jurors did not warrant reversal of petitioner's conviction. The issue has no continuing importance. All of the courts of appeals that have considered the question agree that the court reporter act (28 U.S.C. 753) requires that all parts of a criminal trial, including the jury *voir dire*, must be reported stenographically.* The court below has explicitly enjoined court reporters within its jurisdiction to report "all phases of the jury selection, including the voir dire." *Stirone* v. *United States*, 341 F. 2d 253, 256, note 4, certiorari denied, May 3, 1965, No. 982, this Term. The district court that tried petitioner abandoned its Rule 19 practice even before *Stirone* was decided, and now the selection of the jury occurs in

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* *United States* v. *Bebik*, 333 F. 2d 736 (C.A. 4); *Addison* v. *United States*, 317 F. 2d 808 (C.A. 5), certiorari denied, 376 U.S. 905; *Brown* v. *United States*, 314 F. 2d 293 (C.A. 9); *Parrott* v. *United States*, 314 F. 2d 46 (C.A. 10); *Stephens* v. *United States*, 289 F. 2d 308 (C.A. 5); cf. *McDowell* v. *United States*, 336 F. 2d 435 (C.A. 6), certiorari denied, 379 U.S. 980; *United States* v. *Plattner*, 330 F. 2d 271, 275–276 (C.A. 2).

open court with a court reporter present recording the proceedings. Since the practice has been uniformly disapproved, the issue is not likely to recur.

In the circumstances of the present case, no rights of petitioner were violated. The cases hold, without exception, that, although 28 U.S.C. 753(b) imposes a duty on court reporters to record a criminal proceeding in its entirety, the failure to record a portion of the trial is not reversible error *per se*. *E.g., Addison* v. *United States*, 317 F. 2d 808 (C.A. 5); certiorari denied, 376 U.S. 905; *Brown* v. *United States*, 314 F. 2d 293 (C.A. 9). A conviction will not be reversed unless a specific error has occurred that cannot be reviewed on appeal without a transcript. *E.g., Washington* v. *United States*, 327 F. 2d 793 (C.A. 5); *Parrott* v. *United States*, 314 F. 2d 46 (C.A. 10). In the instant case, petitioner has never even alleged that any errors occurred during the jury selection. Moreover, as the court below held (Pet. App. 5–6), when petitioner signed, and his counsel attested, the "Statement of Satisfaction as to the Procedure Applied to the Selecting of Jury," they expressly waived the court reporter act. See *Addison* v. *United States*, 317 F. 2d at 811.

Nor does the ruling below constitute a denial of any right to search the record for plain error under Rule 52(b), F.R. Crim. P. Failure to object to any possible errors during the *voir dire* was not inadvertent; petitioner and his retained counsel signed a document expressing complete satisfaction with the selec-

tion of the jury. On such a record petitioner could not argue plain error.[3] He could not reject on appeal the strategy deliberately and consciously chosen at the trial—that of accepting the jury as constituted; to do so would amount to a "deliberate bypassing". See *Henry* v. *Mississippi*, 379 U.S. 443; *Johnson* v. *United States*, 318 U.S. 189, 201.[4]

2. Petitioner also contends (Pet. 7–17) that agents of the Intelligence Division, Internal Revenue Serv-

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[3] In finding that petitioner had a right to search the record for plain error, the dissenting opinion relied on *Hardy* v. *United States*, 375 U.S. 277, where this Court exercised its supervisory power to furnish a free transcript to an indigent so that his appointed counsel on appeal, who was not counsel at the trial, could conduct such a search for plain error. That reliance on *Hardy*, we respectfully submit, was misplaced. First, petitioner's trial counsel has represented him on appeal, while in *Hardy* a critical fact was that counsel on appeal was not present at the trial. Secondly, the transcript this Court gave Hardy did not include the *voir dire* examination, a fact of significance because the possibility of plain error occurring during the selection of the jury is remote. Finally, the competing values involved in *Hardy* differ from those involved in the present case. In *Hardy*, since the reporter had recorded the proceedings, the issue was whether the government should incur the expense of paying the reporter to transcribe his notes; and this Court held that an indigent's interest in searching the record outweighed the government's interest in saving money. In the present case, petitioner asks to have the entire trial and conviction voided even though he was represented by retained counsel and expressly waived the right to a transcript.

[4] For the same reason, *Brown* v. *United States*, *supra*, where the court remanded to reconstruct the record under Rule 75(h), F.R. Civ. P., to discover if plain error occurred in the jury arguments, has no application to the present case. In any event, plain error is more likely to occur during jury argument than during the *voir dire*, and petitioner at no stage of this proceeding has asked to reconstruct the record under Rule 75(h).

ice, could not execute search warrants. The opinion of the court of appeals treats the issue exhaustively (Pet. App. 8–13), and we rely upon that opinion. We add only that this issue has no significance for the future since the Congress has enacted legislation clarifying the power of Internal Revenue agents in this respect. 26 U.S.C. (Supp. V) 7608(b).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1965.

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